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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

KEITH HUDSON,

Petitioner,

vs.

JACK McMILLIAN, MARVIN WOODS and ARTHUR MEZO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICUS CURIAE* OF PRISONERS' LEGAL SERVICES OF NEW YORK, IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

Prisoners' Legal Services of New York ("PLS") is a not-for-profit corporation which provides legal services free of charge to indigent state prisoners who lack other counsel. The New York State prison system now confines over 56,000 individuals under sentence. PLS also provides such services to several hundred New York City prisoners. PLS' staff includes 32 attorneys. It was formed in 1976 in response to the 1971 Attica riot.

Throughout its history, PLS has handled Eighth Amendment excessive force cases. Its docket presently includes twenty-eight cases with such

claims.[1]

The outcome of the instant case may affect present and future cases of PLS clients. For example, in a case decided approximately two years ago, Judge Munson of the Northern District of New York awarded $12,300 to a PLS client for physical injuries and mental distress that resulted from a beating by prison guards, and reserved on punitive damages.[2]

The Court found that the prisoner, John Hayden, was punched and kicked because he "badgered" a guard about another inmate's request to go to a movie being shown in the prison. Judge Munson found Hayden suffered seven bangs and bruises and a retinal hemorrhage which eventually resolved itself, but no permanent injuries. The judge also found Hayden suffered two spells of unconsciousness. His "spells" were episodes of anxiety neu-

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[1] Alexander v. Smith, No. 86-CV 701(C) (W.D.N.Y.)
Atkins v. Coughlin, No. 89-CV-453(T) (W.D.N.Y.)
Blisset v. Coughlin, No. 84-CV-1049(E) (W.D.N.Y.)
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Sackett v. Dylag, No. 86-CV-644 (W.D.N.Y.) ($65,000 judgment for plaintiff entered May 10, 1991; motion for judgment n.o.v. pending)
Scott v. Coughlin, No. 87-CV-1340 (N.D.N.Y.)

[2] The parties later settled all plaintiffs' damage claims and their appeals for $24,600, plus certain interest.

rosis and hyperventilation syndrome. The first spell was triggered by fear during the beating, and the second by fear his attackers, guards who worked in his cellblock, would return. The only treatment Hayden received was Tylenol and Vizine. Hayden v. Maldonado, No. 82-CV-1166, Memorandum - Decision and Order (N.D.N.Y., March 24, 1989) 10,11,16-21. See Appendix A, A-44.

In a case like Hayden's, despite the physical pain, mental distress and unconsciousness, under the Fifth Circuit standard being reviewed here, there might be no "significant injury" and hence no liability. This could be so even though a beating was administered intentionally when there was absolutely no reason whatsoever to use force.

We will offer material

We will offer material primarily related to the New York State prison system, the second largest in the nation.

SUMMARY OF ARGUMENT

The unnecessary and wanton infliction of pain should remain the keystone of Eighth Amendment brutality law, and "significant injury" should not be added as a prerequisite to liability. Physical and mental pain can be severe enough that their unjustified infliction offends contemporary standards of decency. The terror a prison beating can inspire is heightened by the fact that the prisoner remains trapped in a closed society, at the mercy of its keepers.

We call the Court's attention to a videotape which we have

dent in a New York State prison which resulted in the federal criminal prosecution of two staff members. It illustrates our point about how severe the pain and terror of a prison beating can be. The conduct it depicts is contrary to contemporary standards of decency, regardless of whether the resulting injuries require short term treatment or are permanent.

The appropriate standard in cases such as those on the videotape and Hudson's is the "unnecessary and wanton infliction of pain." While not every push or shove violates the Constitution, where no force is necessary, no deference is due the need to make spilt-second decisions. Hence, the "malicious and sadistic" standard is inappropriate in these cases.

In Hudson's case, the guards' conduct violated prison order

and security. Prison systems have a strong interest in preventing such guard conduct. The spark for the 1971 Attica riot was an incident in which inmates believed two of their fellows were beaten while being taken to disciplinary housing, in part because that is what they had come to expect. Beatings without justification do not teach inmates anything positive about how to conduct themselves, and are contrary to the State's interest in rehabilitation.

The Commissioner of New York State's prison system has frankly acknowledged a brutality problem. A "significant injury" requirement would complicate the state's task of operating safe and orderly prisons.

Grossly inhumane practices once common in our prisons, the like of which have occurred in New York State in the past two decades, may not

create "significant injury." Adding a "significant injury" requirement would remove the Eighth Amendment as a barrier to practices which should be relegated to our past.

Contrary to respondents' suggestion, adding a "significant injury" requirement will not reduce factual disputes. Other means, such as use of video cameras, are better suited for that purpose. Such a requirement would, however, increase the importance of prison medical records.

Unlike free world medical records, prison medical records are created in an atmosphere where neither patient nor provider is necessarily free from coercion and intimidation. New York State prison officials have described a brutally-enforced "code of silence." Prison records may be altered or destroyed to cover wrong-doing. Whether inmates even see medical personnel after a beating may depend on the beaters or their friends.

Prison records are often sloppily written, and the examinations are far from ideal. For example, in Attica, physical assessments on admission to disciplinary housing last 10-28 seconds. Brutality complaints often arise from events just prior to such admissions.

Moreover, prisoners generally can turn to no one other than those provided by their keepers for documentation of their injuries. Making even liability, not just damages, more dependent on prison medical records will not contribute to fairness.

Finally, if Eighth Amendment liability is made to turn more on whether injuries are treated, a

disincentive to treat will be created. Likewise, conduct which can have very serious consequences will be encouraged. For example, the Fifth Circuit appears to have held that choking an inmate unconscious does not in itself violate the Eighth Amendment. Recently, two inmates in this State died from such force.

The decision of the Court of Appeals requiring proof of "significant injury" in Eighth Amendment cases should be vacated, and the judgment of the District Court reinstated.

POINT I

THE UNNECESSARY AND WANTON INFLICTION OF PAIN, NOT SIGNIFICANT INJURY, SHOULD BE THE KEY TO EIGHTH AMENDMENT LIABILITY IN BRUTALITY CASES.

As petitioner Hudson argues, it is the unnecessary and wanton infliction of pain that should remain

the keystone of Eighth Amendment brutality law, and "significant injury" should not be added as a prerequisite. Where there is no need for force, as in Hudson's case, injury beyond de minimis should create liability. Pain, physical and/or mental, can be great enough to contravene contemporary standards of decency if inflicted without justification, even in the absence of "significant injury."

We have lodged with the Clerk as Appendix B to this brief a videotape of a prison incident[3] which

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[3] The incident occurred July 5, 1980 at Clinton Correctional Facility, Dannemora, NY, 12929, which retains the original tape. The tape shows areas inside the Special Housing Unit, or disciplinary housing. The incident began as the inmate was taken out of his cell; the tape probably does not show all the force used on the inmate. The rapid switches in scene occur as the video system operator switches through various cameras. The lack of sound in part of the tape is so in the original. Parts of the tape were broadcast on NBC news nationally and on the local television news in Albany and Plattsburgh, N.Y., in April, 1982.

videotape of a prison incident[3] which provoked the federal criminal prosecution of a prison guard and a sergeant.[4] We call particular attention to the first three minutes and a couple of

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[3] The incident occurred July 5, 1980 at Clinton Correctional Facility, Dannemora, NY, 12929, which retains the original tape. The tape shows areas inside the Special Housing Unit, or disciplinary housing. The incident began as the inmate was taken out of his cell; the tape probably does not show all the force used on the inmate. The rapid switches in scene occur as the video system operator switches through various cameras. The lack of sound in part of the tape is so in the original. Parts of the tape were broadcast on NBC news nationally and on the local television news in Albany and Plattsburgh, N.Y., in April, 1982.

[4] They were indicted and tried for violating the inmate's constitutional rights. Pretrial matters produced two reported opinions: United States v. Pageau, 526 F.Supp. 1221 (N.D.N.Y. 1981) (tape admissible), and 535 F.Supp. 1031 (N.D.N.Y. 1982), (media may copy tape). The first trial resulted in a mistrial. The indictments were later dismissed in exchange for the defendants' accepting administrative penalties of a month's suspension without pay (almost double the potential criminal fines) and a year's assignment away from inmate contact. See Ottaway News Service story, "Guards' Plea Bargain Brings Dismissal of Charges," carried in Plattsburgh Press-Republican, June 8, 1982, p. 1, col. 1. We refer to press accounts because almost no portion of either trial was transcribed.

provocation.[5] The sergeant does not stop the kicks and blows, and actually appears to join in. Although the situation is not identical to Hudson's, the similarities are substantial.[6]

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[5] One of the press descriptions of the tape says:

> One of the . . . guards has a club approximately two feet long, and is seen delivering at least half a dozen blows at the man on the ground. . . . The man on the ground screamed, "Go ahead, kill me, kill me, you (expletive), go ahead, kill me.". . . One of the guards responded, "I will, I will. I'd love nothing better. . . . Give me an excuse . . ." The guard repeated, "give me an excuse" about half a dozen times.

Another story adds, "[g]ive me an excuse, you slant-eyed (expletive)." Ottaway News Service stories, "Judge to Rule Today on Use of Video-Tapes in Trial" and "Alleged Victim a No-Show, Prosecution Rests," carried by Plattsburgh Press-Republican, October 21, 1981, p. 5, col. 1, and June 5, 1982, p. 5 , col. 1, respectively. Note the dialogue at about 8:34 on the clock counter.

[6] According to prisoner records and press accounts of the evidence, John Eng had many contusions and abrasions, cuts requiring stitches in his head and thigh, and a fracture of a small bone just above the knuckle of his little finger, which was splinted. He was hospitalized for two days. Ottaway News Service stories, "Trial Opens in Case of Beaten Prison Inmate," "2 Prison Guards Face Second Trial Starting Today," and "Rights of

(continued...)

Although the incident started when Eng, upon leaving his cell, grabbed the officer by the throat, Judge Miner, then of the Northern District of New York, framed the issue in the federal prosecution of the guard and sergeant as one "of intentional use of excessive and unnecessary force" since the tape depicts "defendant Pageau striking the inmate a number of times with his nightstick and also depicts defendant Welch kicking the inmate on one or more occasions." United States v. Pageau, 535 F.Supp. 1031, 1033, n.3, (N.D.N.Y. 1982).

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[6](...continued)

Inmates, Prison Guards, Being Weighed at Trial in Albany," run by Plattsburgh Press-Republican, February 11, 1982, p. 5, col. 7, June 3, 1982, p. 5, col. 1, and June 4, 1982, p. 5, col. 1, respectively. While inmate Eng clearly had "significant injuries," conduct such as that on the videotape should not be made constitutional by the subtraction of a couple of the most damaging kicks or clubbings.

In thinking about the terror a prison beating can inspire, it is necessary to remember that prisoners are cut off from the world, and often left at the mercy of their keepers. Prison beatings occur out of public view. Very few beatings are on videotape. We offer the Eng videotape to show how much pain and terror can be involved. We submit that the media interest in the tape in 1982 (see footnotes 3 and 4), like the media interest in the video of the police handling of Rodney King in Los Angeles, was due to the fact that conduct, like that seen on the Eng videotape, greatly offends contemporary standards of decency, whether or not it causes "significant injury." Estelle v. Gamble, 429 U.S. 97, 103 (1976).

POINT II

THE PRESENT CASE EXEMPLIFIES THOSE WHERE AN "UNNECESSARY AND WANTON" STANDARD, RATHER THAN A "MALICIOUS AND SADISTIC" STANDARD, IS APPROPRIATE.

This Court has ensured that prison authorities have wide latitude to maintain prison order and discipline. See, e.g., Hewitt v. Helms, 459 U.S. 460, 470, 472 (1983). That latitude should not extend to the use of force to inflict pain when there is no legitimate occasion for the use of force.

There are occasions during disturbances when prison authorities must make split-second decisions on the use of force, and where hindsight is less important than "the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials." Whitley v. Albers, 475 U.S. 312, 321

(1986). In such circumstances, Whitley teaches that a "malicious and sadistic" standard is a fitting measure of the basic constitutional test of "unnecessary and wanton infliction of pain." Id. at 320-321.

However, there are cases, such as Hudson's, when force is not applied as a "prophylactic or preventive measure intended to reduce . . . breaches of prison discipline." Whitley, 475 U.S. at 322. In such cases, a standard of simply "unnecessary and wanton infliction of pain," Whitley, 475 U.S. at 320, is appropriate, even though "[n]ot every push or shove . . . violates a prisoner's constitutional rights." Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), cert. denied, 414 U.S. 1033 (1973).

POINT III

WHEN GUARDS BREACH PRISON DISCIPLINE BY NEEDLESSLY BEATING INMATES, THEY UNDERMINE THE STATE'S INTERESTS IN SECURITY, ORDER AND REHABILITATION, AND ENDANGER ALL THOSE WITHIN PRISON WALLS.

States have a strong interest in preventing their prison staffs from needlessly beating inmates. Louisiana[7], like New York[8], has rules against the conduct found by the Magistrate in the instant case to be unconstitutional. It is more than ironic that the Louisiana Attorney General is before this Court arguing that such conduct should be constitutional.

Just as civil disturbances can be triggered by police mis-

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[7] In the instant case, Officer James Cole testified that an officer who abuses an inmate is subject to disciplinary action and probably discharge. Magistrate's opinion, p. 6, Joint Appendix at 23.

[8] The disciplinary charges against the guard and sergeant in the Eng incident were of this nature. See footnote 4. The New York statute and administrative rules are quoted Appendix D.

handling of citizens, prison disturbances can be triggered by "a random incident that gets out of control and sows the seeds of discontent in an inmate population," such as one when "a staff member momentarily loses self-control and hits an inmate." American Correctional Association, Riots and Disturbances in Correctional Institutions 19 (3d ed., 1990). Therefore, Corrections Officers must be extremely careful when subduing a violent prisoner in front of other inmates. "If the situation is not handled correctly, violence may spread." Nick Pappas, editor, The Jail: Its Operation and Management, United States Bureau of Prisons in cooperation with the University of Wisconsin, reprinted by the Department of the Navy, 1977, p. 83.

Even the New York State Department of Correctional Services be-

lieves this to be true. That department argued against the media's request to copy the "Eng videotape,"[9] because they felt that if their inmates were to view the tape on television, there would be "a very real and immediate risk of a violent disturbance." United States v. Pageau, 535 F.Supp. 1031, 1033 (N.D.N.Y. 1982) (quoting from affidavit of a Deputy Commissioner).

Any unnecessary violence seen or heard or discussed among prisoners is alarming. The spark for the 1971 Attica riot was a situation in which inmates believed two of their fellows had been beaten while being

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[9] The tape, discussed at pp. 5 and 11-15, was lodged with the Clerk as Appendix B to this brief. We have asked the Clerk to notify the New York State Department of Law if any media organization requests to copy the tape.

taken to disciplinary housing.[10] The rumor was based in part on their expectation that this would occur. Attica: The Official Report of the New York State Special Commission on Attica, 142-157 (1972).

The resentment which follows an unjustified beating hinders both rehabilitation and the maintenance of order and security. Unjustified punishment of any kind not only "generates hatred toward the keepers and the system which permits it," but also degrades "the punisher and the punished alike." Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir., 1968) (Blackmun, J.). In addition,

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[10] Hudson was also beaten while being taken to the "dungeon," with other inmates hearing the beating or seeing the results.

Magistrate's opinion 3-5 and 9, Joint Appendix 21, 22 and 25.

> Prisoners cannot be expected to control their behavior if jail personnel show by their attitudes and their behavior on the job that they themselves cannot maintain self-control.

Pappas, supra., 75.

Furthermore, the American Correctional Association's Manual of Correctional Standards, states that well run prisons allow force "only when necessary to protect one's self or others from injury, or to prevent escape, or serious injury to property" and allow only as "much force . . . as is necessary to control the person...." 416-17 (3d ed., 1966).[11]

There is no question that brutality occurs in New York State prisons. Thomas A. Coughlin, III, the present Commissioner, testified in 1984

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[11] See Appendix D for the relevant New York statute and administrative policy.

that he "had a problem . . . with Corrections Officers beating up inmates . . . [and] getting . . . adequate proof that could convict Corrections Officers of assault." Record of hearing before referee 28-29, Exhibit A to Brief for Respondent In the Matter of Brian F. Malone, 65 N.Y.2d 772, 482 N.E.2d 565, 492 N.Y.S.2d 947, (1985). Just four weeks ago, he testified that there still are a

> distinct number of individuals . . . who engage in racial misconduct and who, occasionally commit acts of violence against inmates....
>
> The challenge . . . is . . . to ascertain who these individuals are, to catch them committing an act of racism or brutality and then to impose the harshest disciplinary penalty the law will allow.

Testimony of Thomas A. Coughlin, III, before the New York State Black and Puerto Rican Legislative Caucus Committee on Criminal Justice, presented at

hearing on Use of Force and Deadly Force in New York State Correctional Facilities, June 12, 1991 (available from N.Y.S. Department of Correctional Services, Building 2, State Campus, Albany, NY 12226).

It does not serve any legitimate penological purpose to create further obstacles to the civil and criminal prosecution of correction officers who undermine the prison system through inappropriate and unjustified uses of force.

POINT IV

A "SIGNIFICANT INJURY" STANDARD WOULD LEGITIMIZE PRACTICES WHICH SHOULD BE RELEGATED TO OUR PAST.

Aside from physical brutality and the infliction of terror, other sorts of prisoner mistreatment are inconsistent with contemporary standards of decency, and hence ought to remain proscribed by the Eighth

Amendment. Estelle, 429 U.S. at 103. Some may not leave any discernible physical injury, "significant" or otherwise.

If the Eighth Amendment proscribes only "significant injury" as the Fifth Circuit uses the term, many of the following list of physical punishments could well be administered constitutionally:

> ...flogging, strapping, beating with fists or clubs, spraying with a stream of water, stringing up by the wrists, exposure to extremes of heat or cold or to electric shock, confinement in the stocks or in cramped sweatboxes, handcuffing to cell doors or posts, shackling so as to enforce cramped position or to cut off circulation, standing for excessive periods "on the line" or barrel-heads, painted circles, etc., deprivation of sufficient light, ventilation, food or exercise to maintain physical and mental health, forcing a prisoner to remain awake until he is mentally exhausted, etc.

This list was compiled by the American Correctional Association ("ACA"), which

apparently thought the listed practices likely enough as of 1966 to specify them as corporal punishments which "should never be used under any circumstances." American Correctional Association, Manual of Correctional Standards 416, 417 (3d ed., 1966).

Despite the fact that New York probably has one of the better run prison systems, we have seen in the past two decades not only beatings, but also some practices similar to those on the ACA list. Two such instances will be described in the subsequent paragraphs.

The first followed the retaking of Attica's D yard in 1971, where "not-too-disguised attempts were made to hit [inmates] in the genitalia" to get them to lie on the ground, according to a National Guard doctor. Suspected leaders of the riot were

marked with chalk Xs on their backs. Additionally,

> One large inmate, after he was stripped, was ordered to lie down on his back across a recreation table. A football was placed under his chin, and he was told he would be dead if the football fell. . . .
>
> Three or four inmates picked out as leaders were ordered to lie on their backs in A yard with their knees drawn up, and shotgun shells were balanced on their knees and chests. . . . [Other inmates] said some troopers and correction officers on A catwalk above them occasionally flipped down lighted cigarettes on them. Other peace officers spat down on them.[8]
>
> [8] The inmates' statements were corroborated by National Guardsmen . . . . In addition, a medical examination . . . noted multiple first degree burns on buttocks and other parts of the bodies of several inmates.

Attica: The Official Report of the New York State Special Commission on Attica, 429, 431, 435.

Furthermore,

> A guardsman carrying an inmate back to A block from

the hospital that afternoon testified: "I was assigned to one stretcher on which there was a large black man. There were gun wounds in his legs and rear end.

...

"A . . . [correction officer] came up to us and asked what was wrong with this particular prisoner, and I told him the inmate had gunshot wounds in the legs. My telling him seemingly went unnoticed. He told us to put the inmate down. [The man then] picked the head end of the stretcher up and dumped [the inmate] onto his feet. The [inmate] fell over onto his shoulder and really bounced off the floor. There was debris and slime water all over the floor.

"Then this non-uniformed man pulled out a Phillips screwdriver and [said to the inmate], who was lying on the floor on his back, 'If you don't get moving - if you don't get up on your feet you are going to get this right up your ass.' Then he did stick this man right in the anal area five or six times. And the prisoner, he didn't say a word, but just sort of [got up and] pushed with his legs toward the cellblock this man wanted him to go into . . . [T]he prison guards were standing around and seemingly not even noticing it.

Id, 436-437 (bracketed material is so in

original). The official report contains other lengthy accounts of gauntlets and beatings, including beatings of wounded inmates on stretchers, the routine racial abuse, etc... Id, 428-441, 452-453.[12]

The second incident occurred in 1981, following the negotiated resolution of a disturbance at the Westchester County Jail in which one staff member was slightly injured. State Correctional Emergency Response Teams had regained control of the jail. Senior state prison administrators and watchdog agency monitors were present. Nonetheless, the staff, some of whom were not wearing name tags and thus were difficult to identify, assembled all inmates at

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[12] See Al-Jundi v. Mancusi, 926 F.2d 235 (2d Cir. 1991), Al-Jundi v. Estate of Rockefeller, 885 F.2d 1060 (2d Cir. 1989), and Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971) for the history of the litigation about the retribution after the retaking of Attica.

aproximately 11:00 p.m.

> in the courtyard . . . without clothes or shoes, and their hands remained cuffed behind their backs. . . . Inmates were forced to stand in their position and remain silent. . . . At about 12 a.m. . . . the inmates were permitted to sit down, but a moment later were made to stand for the count. Many were able to sit only with the assistance of officers while others lay flat, apparently because of the discomfort experienced in trying to sit. . . .
>
> During the time they were in the yard, numerous inmates began to complain about the tightness of their handcuffs. They complained of numbness in their hands, and SCOC staff noted that in some cases, the flexicuffs had deeply indented the skin. . . . In a few cases, inmates apparently passed out.[13]

New York State Commission of Correction, Report of the Westchester County Jail Disturbance, July, 1981, 22-23 (available

[13] It is not surprising that the most widespread and well documented staff misbehavior occurs after disturbances, especially ones where staff is hurt. Both those who hurt staff and those who did not can become targets.

from N.Y.S. Commission of Correction, 60 South Pearl Street, Albany, NY 12207).[14]

The Fifth Circuit's "significant injury" standard would shield from Eighth Amendment scrutiny conduct which, according to the ACA, "should never be used under any circumstances." In the absence of what the Fifth Circuit considers "significant injury," these practices would be constitutional.

POINT V

REQUIRING "SIGNIFICANT INJURY" WILL NOT END FACTUAL DISPUTES, BUT WILL FOCUS INCREASED ATTENTION ON UNRELIABLE PRISON MEDICAL RECORDS.

Requiring "significant injury" will not end factual disputes in

[14] The state eventually settled 300 inmates' claims from this incident for $250,000. Allman v. Coughlin, No. 82-CV-1149 (GLG) (S.D.N.Y.).

prison brutality cases.[15] Courts are, after all, designed to resolve factual disputes. But requiring "significant injury" will focus more attention on

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[15] A useful way to cut down factual disputes is to use video cameras in locations which produce many brutality complaints. According to the Inspector General of the New York State Department of Correctional Services, installation of a closed-circuit television system in the disciplinary housing area of one New York State prison cut down brutality complaints by 95%. Expansion of such systems was recommended to Governor Cuomo by a state special commission. New York State Commission on Criminal Justice and the Use of Force, Report to the Governor 343, 355-357, n.23 at 365, and n.44 at 367 (1987). Four weeks ago, the Commissioner of New York's prison system stated:

> Videotaping . . . [is] an extremely important managerial tool. It is next to impossible for either an inmate or a staff member to argue that an incident which is depicted on videotape did not actually happen the way the videotape shows it to have happened.

Testimony of Thomas A. Coughlin, III, before the N.Y.S. Black and Puerto Rican Legislative Caucus Committee on Criminal Justice, 6, presented at hearing on Use of Force and Deadly Force in New York State Correctional Facilities, June 12, 1991 (available from N.Y.S. Department of Correctional Services, Building 2, State Campus, Albany, NY 12226).

Aside from New York State, at least Illinois uses video cameras in its prisons. See Freeman v. Franzen, 695 F.2d 485, 489 (7th Cir. 1982), cert. denied sub nom. Branche v. Freeman, 463 U.S. 1214 (1982).

prison medical records in establishing the extent of both injuries and liability.

Prison medical records are not like medical records in the free world. Neither the patient nor the medical provider is necessarily free from coercion and intimidation. Medical providers in the prison system are often far from detached recorders of truth. Additionally, prison medical records have been altered, concealed and destroyed to cover misconduct. In many instances, records are ineptly kept and examinations are conducted sloppily or under circumstances inimical to a thorough evaluation. See Todaro v. Ward, 431 F.Supp. 1129 (S.D.N.Y. 1977), aff'd 565 F.2d 48 (2d Cir. 1977).

Increased reliance on prison medical records will create added pressures for the under-recording of

injuries, and the destruction of records. The current Inspector General of the New York State Department of Correctional Services, Brian F. Malone, gave this account of an incident involving the use of force at a New York prison, in a June 8, 1983 letter to the Committee on Professional Standards:

> [C]ertain medical documents had been removed from an inmate's folder who had suffered a knee injury and a head wound. . . . [The] nurse who had treated this inmate on the date of the incident, and who, at the time of the interview, had secured other employment, [said that] an attempt had been made to alter the treatment records so that two separate medical procedures would be interpreted as one, thus obfuscating a period of time where excessive force was utilized, as well as documenting a false reason for the inmate's head wound.

The letter is Exhibit C to Respondent's Brief. In the Matter of Brian F. Malone, 65 N.Y.2d 772, 492 N.Y.S.2d 947, 482 N.E.2d, 565 (1985), aff'g, 105

A.D.2d 455, 480 N.Y.S. 2d 603 (3d Dep't 1984).

In In the Matter of Brian F. Malone, Malone, an attorney, faced misconduct charges stemming from his attempt in a brutality case to pierce the guards' "code of silence." He felt the "code" was facilitated by the joint representation by a union lawyer of both targets and potential staff informants in his investigations. Malone submitted the letter previously quoted to explain the impediments to his investigations. The record of testimony in Malone's case, reflected in the dissents in the Court of Appeals and Appellate Division, indicated a guard breaking the "code" would be rare and might well have reason to fear

physical retaliation.[16]

Where there is a brutally enforced "code of silence," medical personnel have reason to fear for their safety if they record injuries in a way which suggests guard brutality. The Guards who beat an inmate may be standing over the inmate and the medical provider during any examination. Aside

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[16] Ramon Rodriguez, Counsel for the Department of Correctional Services at the time of the events leading to the charges against Malone, testified:

> . . . [T]his was the first time in my memory . . we had a real live [uniformed] witness, who watched and saw brutality occur in one of our prisons. It is a very rare occurrence.
>
> . . . We were both very concerned . . . that Mr. Lewis [a guard who reported that three other guards had beaten an inmate without cause], who was in fear of his safety, would not want to testify. . . . [W]e spent a great deal of time trying to figure out how we could make it as safe as possible for Mr. Lewis because he was doing something . . . that would put him in a great deal of danger.

Record of hearing before referee 45, 47-48, 54-55, Exhibit A to Brief for Respondent In the Matter of Brian F. Malone, 65 N.Y.2d 772, 492 N.Y.S.2d 947, 482 N.E.2d 565 (1985).

from facing direct retaliation and harassment, medical providers could find themselves left in the lurch when needing security assistance from guards.

If they fear further mistreatment, brutalized inmates may be afraid to seek medical aid, or to say how they got their injuries. The latter is what the court concluded occurred in Hayden v. Maldonado, No. 82-CV-1166, Memorandum - Decision and Order (N.D.N.Y. March 24, 1989) 20-21. See Appendix, A-41.

Whether inmates will even see medical staff, and after what delay, may be up to the very people who used force, or their work mates. Hudson testified he repeatedly sought medical treatment, but to no avail. Magistrate's opinion 8, Joint Appendix 25. See, for example, Simpson v. Hines, 903 F.2d 400 (5th Cir. 1990),

where ten policemen and guards entered a cell to search one man. He was left dead on the floor, and although he was observed to be motionless twice in the next five hours, no medical help was called.

A striking example of under-recording of injuries in prison medical records comes from a PLS case, Young v. Napper, No. 86-CV-453 (N.D.N.Y.). Our client, Cedric Young, was involved in a series of incidents in which force was used on him on the morning of July 8, 1985. Photographs made by PLS the next day[17] and deposition exhibits 85 and 86, are in the appendix at C-9 and C-10. They show obvious swelling, bruising and abrasions on his face. The prison medical

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[17] Our clients are not often fortunate enough to be photographed by outsiders so soon after a beating.

records show he was seen by medical staff at 9 a.m., 9:30 a.m., 11:30 a.m., and 3:55 p.m. on the day of the incident, and 4:20 p.m. the next day, as well as at sick call on July 11, 17 and 18. The records note various injuries on his body, but there is not a word about facial injuries. Deposition exhibits at appendix, C-2 to C-8. The facial injuries shown in the photos may not qualify as "significant injuries," but excessive force producing them should not be constitutional, regardless.

Young's claim was settled for $12,000. Had it been tried, the factual disputes most likely would have included just what his injuries were and when he got them, as in any case where the adequacy of prison medical records is challenged.

The adequacy of medical

care for inmates in Attica's Special Housing Unit ("SHU") (disciplinary housing) is at issue in Eng v. Coughlin, No. 80-CV-385(T) (W.D.N.Y.). The medical care in such a setting is critical to documenting brutality, since many inmate complaints of brutality concern events which occurred just before or during their transfer to the SHU. This is logical, since inmates are moved to the SHU after they have had major difficulties with staff, and staff may still be angry at them during the transfer process.[18]

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[18] After taking testimony on a number of incidents at Attica, a state court judge found:

> . . . brutality has occurred when inmates are being transferred from General Population to the Special Housing Unit. . . . Apparently, it starts as an intimidation effort. . . . As could be expected, several times the intimidation escalated into much more serious matters. One man suffered a seriously broken leg and at least two others had cuts on their heads that required suturing.
>
> (continued...)

In Eng, PLS sought a preliminary injunction when an inmate died following a violent confrontation with staff. The incident raised very serious questions about emergency care for inmates in Attica's SHU. The Court preliminarily ordered that all medical staff be periodically trained in (among other things) proper procedure in assessing an inmate's condition, the necessity of conducting a thorough personal examination when medically appropriate, and accurately and completely filling out ambulatory health records. A further hearing is set on

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[18](...continued)

> . . . The testimony further disclosed that on most occasions the Correction Officers had removed their name tags . . . This action on their part indicated that trouble was expected and they did not wish to be identified.

Matter of Ware v. Smith, Index No. 11, 186, Memorandum and Judgment 3-4 (Wyoming County Sup. Ct., December 30, 1983).

(among other things) the degree to which adequate medical examinations can be done through plexiglass attached to the fronts of cells, the proper scope of medical examination on admission to the SHU, the adequacy of medical records, the provision of Spanish interpreters in emergencies, and whether medical care is delayed or effectively denied in certain types of cases.

The Court noted that the inmates' expert had reviewed 17 medical files and found serious deficiencies in 12, and defendants' expert agreed there were deficiencies in eight. In one of those,

> . . . an inmate denied injury when he arrived at the SHU . . . and physical examination upon admittance consisted only of a "nude viewing." Raymond Rpt. at 19-20. Several hours later, however, the inmate complained to a CO that he could not move. Although the CO reported this to the RN on duty, she merely recommended that the CO administer

> Tylenol and did not come to the SHU to talk to or examine the inmate. An hour later, the CO observed the inmate lying motionless on the floor of his cell and again notified the nurse. This time, the nurse came to the SHU, and in her notes reported the inmate's complaints of pain and numbness in his extremities. Despite the potentially serious nature of the complaints, her only recorded physical assessment was "no visible injuries." Raymond Rpt. at 19-20; Hines Aff. ¶ 37(3). No further action appears to have been taken in this case.

Eng v. Coughlin, No. 80-CV-385(T), Decision and Order 2-3, 7, 12, 14, 16 and 17 (W.D.N.Y., November 5, 1990).

Additionally, a report of the inmates' expert which was before the Court provides:

> Many records . . . displayed absent, or inadequate physical examination. The substitution of visual inspection for physical examination is untenable. The subjective impression of a nurse or PA based on such visual inspection . . . represents an unacceptable level of access to meaningful medical intervention. . . . Simple and basic elements of physical examination can, and

must be performed in order to adequately assess the serious medical complaints of inmates.

. . .

Multiple instances of poor medical records and clinical charting practices were identified. Several charts were noted to have incomplete SOAP entries. . . . Some SOAP notes contained only an outline of the therapeutic **P**lan, without benefit of the **S**ubjective (inmate's stated complaint), **O**bjective (physical exam and diagnostic testing), or **A**ssessment (diagnostic impression). This practice causes future reviewers . . . to have to guess at these other components by virtue of the nature of the therapeutic plan.

Albert J. Raymond, M.D., Eng v. Coughlin, Attica Visit #2 - Case Reports 26-27 (9/6/90).[19]

The report also states:

> **Medical Screening of Inmates Transferred into the SHU:** . . . In a series of some fifteen consecutive videotaped screening exams . . . the longest examination performed lasted only 28 seconds,

[19] A typed version of an example is at appendix, C-4 to C-6. This form, the Ambulatory Health Record, is used in all New York State prisons.

> with five of the fifteen exams lasting less than 10 seconds. . . . Essentially a brief medical inventory of questions were asked by rote, and included in-quiries as to any injuries, medical problems, and medications, followed by the nude viewing and quick exit of the medical personnel from the scene.

Id, 29.

Exceedingly poor medical records were found at another New York State prison in Todaro v. Ward, 431 F. Supp. at 1145-46. In Dean v. Coughlin, 623 F. Supp. 392, 395 (S.D.N.Y. 1985), the dental system was found "defunct" as to routine care, in part because 300 inmate requests to see the dentist were stuffed into a gauze box and ignored. Similar findings are not uncommon.[20]

Elevating the importance

[20] See, e.g., Newman v. Alabama, 503 F.2d 1320, 1323 (5th Cir. 1974); Lightfoot v. Walker, 486 F.Supp. 504, 517 (S.D.Ill. 1980); LeMaire v. Maass, 745 F.Supp. 623, 633 (D.Or. 1990); Ruiz v. Estelle, 503 F.Supp. 1265, 1323 (S.D.Tex. 1980); Hoptowit v. Ray, 682 F.2d 1237, 1252-1253 (9th Cir. 1982).

of prison records is not fair, since inmates almost never have any choice of providers, and are almost always completely at the mercy of those who generate the documentation of their injuries. Contrary to what respondents appear to suggest, given that prison records may be so unreliable, adding a "significant injury" requirement will not reduce factual disputes. See Respondents' Brief in Opposition, p. 9.

POINT VI

REQUIRING "SIGNIFICANT INJURY" MAY DISCOURAGE NEEDED MEDICAL TREATMENT, AND ENCOURAGE VERY DANGEROUS CONDUCT BY GUARDS.

It appears that "significant injury" may be distinguished from "insignificant injury" by the fact of medical treatment. For example, cuts on an in-mate's finger which required sutures were "significant," while Hudson's bangs and bruises and fat lip

and loose teeth were not. Compare Adams v. Hansen, 906 F.2d 192 (5th Cir. 1990) with the Court of Appeals decision in the instant case, Joint Appendix 30-33.

If prison personnel become aware that, absent treatment, a prisoner's injuries may not support a claim of civil or criminal Eighth Amendment violation, a disincentive to provide treatment will be created. Medical personnel could be discouraged from treating, if they are friendly with or intimidated by guards, and guards could be discouraged from taking injured inmates to see medical staff.

Furthermore, the Fifth Circuit has permitted guards to endanger the lives of inmates without any fear of liability. For example, unconsciousness caused by a choke hold, absent "serious or permanent injury

stemming from his brief blackout," was held not a "significant injury" in Wesson v. Oglesby, 910 F.2d 278, 280, 283 (5th Cir. 1990). However, in New York, two state prison inmates have died in the last 32 months as a result of choke holds. In one case, the inmate died as a result of "homicidal sustained compression of the neck and chest." In the other case, the inmate died from "homicidal asphyxia - compression of the neck." The compression in both cases was applied by staff during struggles with the inmates.[21]

Finally, permitting the lack of medical treatment to determine "significant injury" will discourage

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[21] In the Matter of the Death of Darrel Booth, May 10, 1991, and In the Matter of the Death of Shelton Philpot, November 23, 1988 ("one or more . . . treatment assistants applied physical force to the neck of the deceased, resulting in traumatic compression of the neck and fatal asphyxia."), New York State Commission of Correction, 60 South Pearl Street, Albany, NY 12207.

civil and criminal enforcement of the Eighth Amendment. Tragic cases, caused by guards who "overdo it," may well become more numerous. As has been observed by the Eighth Circuit:

> Corporal punishment is easily subject to abuse in the hands of the sadistic and the unscrupulous.
> . . . Where power to punish is granted to persons in lower levels of administrative authority there is an inherent and natural difficulty in enforcing the limitations of that power.

Jackson v. Bishop, 404 F.2d at 578 (concerning supposedly regulated "strapping").

Besides abuse, if unjustified force is permitted at all, it will not be long "before it gets out of hand and rises to dangerous proportions." American Correctional Association, Manual of Correctional Standards, 417 (3d ed., 1966). A state court judge found that is exactly what hap-

pened at Attica. Matter of Ware v. Smith, Index No. 11, 186, Memorandum and Judgment 3 (Wyoming County Sup. Ct., December 30, 1983).

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be reversed and the judgment of the District Court reinstated.

New York, NY,
July 10, 1991

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APPENDICES

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JOHN HAYDEN,

Plaintiff,

v. 82-CV-1166

CORRECTIONS OFFICERS ARISTIDES MALDONADO and LARRY BROOKS,

Defendants.

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HOWARD G. MUNSON, J.

MEMORANDUM-DECISION AND ORDER

From August 11, 1986 to August 14, 1986 the court conducted a non-jury trial in this case at the United States Courthouse in Auburn, New York. The action is brought under 42 U.S.C. §§ 1983 and 1985. It involves the alleged beating of plaintiff, John Hayden, by corrections officers at Clinton Correctional Facility ("Clinton"), Dannemora, New York. Plaintiff claims that three corrections officers, defendants Maldonado, Brooks and a third unidentified officer, assaulted and injured him on May 24, 1981 in Clinton. The following constitutes this court's findings of fact and conclusions of law. See Fed. R. Civ. P. 52. Prior to setting forth the substantive findings and conclusions, the court will address five evidentiary questions left unresolved at trial.

I. Evidentiary Matters.

A. Unfair Surprise in Dr. Ecker's testimony.

At trial plaintiff presented an expert medical witness, Dr. Arthur Ecker. The doctor's testimony went beyond the letter that defendants were given on his proposed testimony. The letter stated that plaintiff's injuries were inconsistent with an epileptic seizure. The doctor, however, altered his opinion and testified at trial that plaintiff suffered from a hyperventilation syndrome and not from epilepsy. He changed his opinion subsequent to examining the plaintiff and

taking a history, all of which was done on the first day of trial.

At trial defense counsel objected to the doctor's testimony to the extent which it went beyond the notice which defendants were given.[1] While an objection was made, defense counsel did not seek a continuance. When unfair surprise is claimed, "the appropriate remedy is a continuance rather than rejection of the evidence." McCormick on Evidence 440 n.34 (E. Cleary 2d ed. 1972); see Outley v. City of New York, 837 F.2d 587, 590 (2d Cir. 1988) (citing Johnson v. H.K. Webster, Inc., 775 F.2d 1, 8 (1st Cir. 1985)). Fed. R. Civ. P. 15(b) supports the view

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1. Transcript ("Tr.") at 212

that continuance is the appropriate remedy to unfair surprise. Id. Additionally, in an effort to minimize the prejudice created by the unfair surprise, the court permitted Physician's Assistant Sorrell to sit in on Doctor Ecker's testimony. Finally, there is no evidence that the lack of notice in the change in Dr. Ecker's testimony stemmed from any willful conduct on the part of plaintiff's attorneys to gain a tactical advantage. See Escalera v. Coombe, 852 F.2d 45, 48 (2d Cir. 1988) (citing Taylor v. Illinois, 108 S. Ct. 646, 655-57 (1988)). The court therefore concludes that Dr. Ecker's testimony was properly admissible even to the extent with which it differed from his original opinion as shared with the defendants.

B. Evidence that defendant Maldonado filed a false report and exercised excessive force.

At trial plaintiff's counsel in his cross-examination of defendant Maldonado sought to elicit testimony and introduce documentary evidence for the purpose of attacking Maldonado's credibility. Specifically, counsel tried to prove that, subsequent to the occurrence which is the subject of this lawsuit, defendant Maldonado was disciplined and received a notice of dismissal for use of excessive force and filing a false report. The disciplinary charges and subsequent notice of dismissal related to an incident which occurred at Clinton on April 5, 1985. At trial, plaintiff's counsel questioned Maldonado regarding the charges and

sought to introduce documentary evidence on the issue. The court reserved decision on defense counsel's objections to the line of questioning and the introduction of documentary evidence.[2]

Counsel in part relies on Fed. R. Evid. 608(b) in seeking to have this evidence admitted.[3] As pertinent, Rule 608(b) provides that:

> Specific instances of conduct of a witness, for the purpose of attacking or supporting his credibility, other than a conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court be inquired into on cross-examination of the witness . . . concerning his character for truthfulness or untruthfulness. . . .

The Rule itself plainly states, and Second Circuit authority holds, that

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2. Plaintiff offered these documents as Exhibits 18, 19 and 20.

3. Plaintiff's Post-Trial Memorandum at 7.

credibility cannot be attacked through extrinsic evidence of specific instances of conduct. United States v. DiPaolo, 804 F.2d 225, 230 (2d Cir. 1986); United States v. Smith, 727 F.2d 214, 221 (2d Cir. 1984); United States v. Clemente, 640 F.2d 1069, 1083 (2d Cir.), cert. denied, 454 U.S. 820 (1981). Under Rule 608(b) Plaintiff's Exhibits 18,19, and 20 are inadmissible. However, cross-examination of Maldonado as to specific acts of conduct is permissible in the court's discretion. United States v. Weichert, 783 F.2d 23, 25 (2d Cir.), cert. denied, 479 U.S. 831 (1986). The court now concludes that it was proper for counsel to cross-examine Maldonado on the charge of filing a false report. See Fed. R. Evid. 608(b). The testimony

adduced through cross-examination showed that Maldonado was involved in an incident on April 5, 1985, that he got a notice of discipline concerning that incident, the notice of discipline sought his dismissal, that he appealed the Department of Correctional Service's ("DOCS") determination and that at the time of trial DOCS continued to seek Maldonado's dismissal, but the entire appeals process was not yet complete.[4] The testimony regarding the charges which was elicited on cross-examination, however, is too sketchy to be of assistance to a fact-finder. It is disjointed -- in part because of the frequent objections of defense counsel -- and not very informative. As a result, the

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4. Tr. at 451 and 460-67.

court will not consider the testimony regarding the charges. See Fed. R. Evid. 403.

Counsel offers a second reason for offering the testimony and documentary evidence of the disciplinary charges which were pending against Maldonado. Counsel asserts that the evidence should come in as to the state of mind of another defense witness, Nurse Dupra. In other words, the evidence is offered on the theory that Nurse Dupra was intimidated as a witness. She, however, denied knowledge of the charges pending against Maldonado.[5] The court will not infer, as plaintiff's counsel suggests, that despite her

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5. Tr. at 365-66.

denials, Nurse Dupra knew of the charges pending against Maldonado. Plaintiff offered no evidence to the effect that these charges had been brought to Nurse Dupra's attention. Even on this second basis, the court will not consider the evidence regarding Maldonado's disciplinary charges. See Fed. R. Evid. 403.

C. Rebuttal Testimony of Brian Malone.

Plaintiff offered in rebuttal the testimony of Brian Malone, the Inspector General of DOCS. His testimony centered around a code of silence which operates among some DOCS personnel. In reaching its conclusion, the court has not relied on this testimony. Therefore, the court need not rule on its admissibility.

D. Max Vidal's Statement.

In his post-trial papers, plaintiff seeks to strike certain testimony elicited on cross-examination from Max Vidal, plaintiff's corroborating witness. The testimony regarded a written statement he gave to Prisoners' Legal Services ("PLS"). Previously, on direct examination the document in question was not used to refresh Vidal's memory. See Fed. R. Evid. 612. Defense counsel did not insist on gaining the statement from the plaintiff.[6] Cf. United States v. Nobles, 422 U.S. 225 (1975) (holding that the prosecution is entitled to the portions of a written report referred to in the testimony of a defense investigator).

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6. Tr. at 191.

In response to defense counsel's questions on the statement given to PLS, Vidal stated that the statement was sworn to, that he did not recall what the statement said, but that he did know that it referred to "this case."[7] Subsequent to discussion at trial on the issue of admissibility of the testimony and the document, counsel for plaintiff withdrew his objection to defense counsel's inquiring into the statement's contents.[8] "In the situation where a party makes an objection, then decides to withdraw it, one may properly speak of the objection as having been waived." C. Wright & K. Graham, Federal Practice and Procedure:

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7. Tr. at 182

8. Tr. at 192.

Evidence § 5033 (1977); see United States v. Montemayor, 684 F.2d 1118, 1123 (5th Cir. 1982). The court concludes that the objection was waived.

Moreover, the testimony elicited regarding the statement did not breach any work-product privilege. Perhaps that is why plaintiff's counsel withdrew his objection. Vidal did not recall the contents of the statement. His testimony did not go to the mental processes of plaintiff's attorneys. See Nobles, 422 U.S. at 238; Hickman v. Taylor, 329 U.S. 495, 514 (1947). Inasmuch as this was testimony given at trial, it could not help defendants prepare for trial, Nobles, 422 U.S. at 248 (White, J., concurring), but could serve in "the search for truth."

Nobles, 422 U.S. at 232.

Finally, it is not at all clear whether plaintiff seeks to strike Vidal's testimony or avert production of the statement. It appears that the concerns of plaintiff's counsel rested with the statement itself. Counsel is worried that the court's decision might form a precedent under which PLS would have to provide to defendants the statements of the witnesses whom PLS has interviewed.[9] For instance, plaintiff's post-trial memorandum argument on this point is made under the heading, "Defendants Are Not Entitled To Max Vidal's Statement." Such an argument is inapposite since Vidal's statement was never

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9. See Tr. at 185.

offered into evidence nor provided to the defendants. For the foregoing reasons, the court will not strike the questions asked and answers given.

E. Vidal's Testimony Regarding Drug use.

Defense counsel cross-examined Vidal regarding his drug use in prison, as well as his being disciplined when drugs were found in his prison cell.[10] At trial, the court reserved decision on the admissibility of such evidence.[11] Defense counsel argued that the evidence was admissible to show Vidal's motive for testifying at trial.[12] The proper analysis for this argument is under Fed. R. Evid. 608 and

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10. Tr. at 194-97.

11. Tr. at 199.

12. Tr. at 195.

not under Rule 404(b) because "'[m]otive' in Rule 404(b) refers to influence over out-of-court acts." C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5240, 1988 Supp. at 422 (1978). The court concludes that the evidence of the disciplinary action was admissible. The fact that corrections officers found drugs in Vidal's cell could in some way impact on his desire to strike out in general at corrections officers. See C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5240, at 475 n.34 (1978) (prior crime can show bias of witness and the prejudice is less if the witness is not a party); cf. United States v. DeLeon, 498 F.2d 1327, 1332-33 (7th Cir. 1974) (evidence of prior crime

is admissible to show that the witness may be testifying in order to fend off any pending prosecution). The evidence of drug use is another matter. In and of itself it does not show a tendency for untruthfulness under Fed. R. Evid. 608(b). See Crimm v. Missouri Pacific R.R. Co., 750 F.2d 703, 707-08 (8th Cir. 1984); see also United States v. Noti, 731 F.2d 610, 612-13 (9th Cir. 1984). Therefore, the court rules inadmissible any testimony of Vidal's drug use.

II. The Injuries to John Hayden.

Neither side in this lawsuit disputes that plaintiff suffered injuries on May 24, 1981. A central issue in this case, though, is whether plaintiff's injuries resulted from a

seizure of some sort or from a beating. To this end the expert medical testimony elicited at trial is crucial. The interpretation of this testimony is the keystone of the court's opinion.

Four medical personnel testified at trial. They were Dr. Arthur Ecker, plaintiff's expert, Elberta Dupra, the nurse who first administered to plaintiff's injuries, Physician's Assistant James Sorrell, who conducted an examination of plaintiff on May 28, 1981, and Dr. Jerome Davis, defendants' expert, a neurologist who sees patient referrals at Clinton and who saw plaintiff on such a referral on or around May 28, 1981.[13]

Plaintiff's injuries are

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13. Tr. at 518.

enumerated in two entries on Exhibit 1-1 which is one page of plaintiff's health record kept at Clinton. The first entry is by Nurse Dupra and was made on May 24, 1981; it lists seven injuries. The second entry is by Sorrell and was made on May 28, 1981. This entry shows one additional injury which the nurse did not find. Plaintiff was injured as follows:

1) a three centimeter bruise on his left side, below the ribs;

2) a black and blue left eyelid;

3) a four inch bruise on his upper left thigh;

4 and 5) reddened areas on both sides of the neck;

6) reddened areas on the

upper chest;

7) small abrasion on the top of the head;

8) and a small hemorrhage in the right retina.

Plaintiff's expert, Dr. Ecker, testified that in his opinion, these injuries did not stem from a seizure of any sort,[14] rather the injuries were consistent with a beating.[15]

Dr. Ecker explained the basis for his medical judgment. As an initial matter, he stated that in his opinion plaintiff does not suffer from epilepsy as defendants suggest. Instead, according to Dr. Ecker, plaintiff suffers from hyperventilation

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14. Tr. at 264-65 and 269.

15. Tr. at 265.

syndrome.[16] The hyperventilation syndrome accompanies an anxiety neurosis.[17] The episodes resulting from this condition start when plaintiff is in a state of fear. The fear leads to muscular tremors, shaking and hard breathing. In the more severe episodes, the sufferer of anxiety neurosis can lose consciousness.[18] Plaintiff himself testified that he suffered from "nervous spells."[19] He stated that he could feel one of these attacks coming on and he would then lay down.[20]

The doctor cited a number of factors which led him to the conclu-

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16. Tr. at 233.
17. Tr. at 223.
18. Tr. at 223-24.
19. Tr. at 20.
20. Id.

sion that plaintiff does not suffer from epilepsy. First, he satisfied himself that during an attack plaintiff bites his tongue deliberately and not involuntarily.[21] The doctor concluded this because there is no scarring of the tongue. Additionally, plaintiff has never wet himself when he has had an "episode." In contrast, it is frequently the case that sufferers of grand mal epilepsy do wet themselves during seizures.[22] Other considerations also influenced Dr. Ecker's opinion. Plaintiff's brain is not scarred. While one recording of plaintiff's brain waves was borderline, the one Dr. Ecker took was normal. Finally, there was no evidence

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21. Tr. at 226.
22. Tr. at 229.

that the medication given plaintiff for his epilepsy -- dilantin and phenobarbital -- reduced the frequency of plaintiff's "episodes."[23]

The relevance of the testimony regarding whether plaintiff suffered from epilepsy or hyperventilation syndrome is the severity of plaintiff's "episodes." Dr. Davis, the defense expert, testified that he has seen someone who has suffered a broken back from an epileptic seizure.[24] In comparison, the tenor of Dr. Ecker's testimony is that hyperventilation syndrome does not jerk the body as violently as a grand mal epileptic seizure.

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23. Tr. at 21-22 (Hayden); Tr at 234-35 (Ecker).

24. Tr. at 236.

As noted, Dr. Ecker's opinion is that plaintiff's injuries did not come from an episode of hyperventilation syndrome. He also stated that the injuries could not have come from an epileptic seizure.[25] As a basis for these conclusions, the doctor noted that plaintiff was injured on both sides of his neck. He also suffered injuries to both eyes. The eyes and the neck are protected areas and are less prone to injury than are more exposed parts of the body. For that reason alone, Dr. Ecker explained, it is unlikely that plaintiff received his injuries from a hyperventilation episode, or even from an epileptic seizure.[26] In addition,

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25. Tr. at 265.

26. Tr. at 269.

the very nature of seizures diminishes the possibility of receiving the injuries in such a manner. According to Dr. Ecker, the head moves up and down in any kind of seizure.[27] As a result, Dr. Ecker did not see how plaintiff could have suffered injuries on both sides of the neck from a seizure or hyperventilation "episode."[28] His opinion remained unchanged even in light of the possibility that plaintiff somehow injured himself on objects in his cell.[29]

The court observed Dr. Ecker to be a thorough and competent witness. In contrast, the defense expert, Dr. Davis, was not as thorough

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27. Tr. at 267.

28. Tr. at 267-68.

29. Tr. at 267-69.

in the explanation of his opinion. Moreover, Dr. Ecker's medical opinion makes sense. The court, as a result, adopts as a finding of fact Dr. Ecker's opinion that plaintiff suffers from attacks related to anxiety neurosis and an accompanying hyperventilation syndrome. Furthermore, the court adopts as a finding of fact Dr. Ecker's opinion that plaintiff's injures suffered on May 24, 1981 did not result from such an attack, or from a grand mal epileptic seizure. Ever Dr. Davis, the defense expert, agreed that plaintiff's injuries were consistent with a beating.[30] Additional support for the court's finding lies in the fact that, even though plaintiff has suffered injuries

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30. Tr. 524.

from previous "episodes," the injuries were never as severe as those suffered on May 21, 1981.[31] On one occasion plaintiff had a nervous "episode" and fell off his bed. The bed collapsed on top of him. At that time, plaintiff suffered red spots on both knees, on his right trunk and on his right hand.[32]

While it is possible that plaintiff could have suffered his injuries from neither a beating nor an epileptic seizure or a hyperventilation "episode," defendants do not posit such a theory. The court will not pursue its own theoretical fishing expedition to rule out all other possible causes of

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31. See Plaintiff's Post-Trial Memorandum, pp. 40-41 (containing a summary of the occasions when plaintiff was seen by medical staff following an "episode").

32. Exhibit ("Exh.") (Accident Report filed 12/4/81); see Tr. at 292.

the injuries. Therefore, given the finding that plaintiff's injuries of May 24, 1981 are not consistent with a seizure or "episode" and are consistent with a beating, the court must next address the question of who administered the beating. Two categories of assailants seem possible, plaintiff's fellow inmates or corrections officers.

Defendants did not present to the court the theory that plaintiff received his injuries from fellow inmates. No testimony was elicited to this effect. Furthermore, defendants' version of the events on May 24th fails to demonstrate that plaintiff was not secure in his cell from between 1 p.m. and 5:30 p.m. Neither side contends that plaintiff received his in-

juries prior to the time when he locked into his cell on the afternoon of May 24, 1981. Both sides agree that plaintiff, acting on defendant Maldonado's instructions, locked into his cell at around 1 p.m.[33] Defendants presented no evidence to show that plaintiff was subsequently "cracked out" of his cell until approximately 5:30 that afternoon. Officer Tourangeau testified that he inspected plaintiff at approximately 1:15 p.m. and again at 2:20 p.m.[34] He conducted his inspection of plaintiff through the plaintiffs' cell bars.[35] In his report on the injuries, Sergeant, now Deputy Superintendent, Colon stated

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33. Tr. at 10 and 436.

34. Tr. at 485-86.

35. Tr. at 485-86.

that Officer Rodriguez went to check on inmate Hayden and saw a bruise on his face.[36] Sergeant Colon's report does not specify whether Officer Rodriguez conducted his inspection of plaintiff inside the cell or outside the cell. Plaintiff was released from his cell at approximately 5:30 p.m. when Sergeant Colon instructed Officer Rodriguez to escort plaintiff to the prison hospital.[37] In sum, it is highly unlikely that plaintiff received [sic] was assaulted by non-prison personnel while he was locked in his cell.

Defendants are corrections officers and plaintiff's complaint revolves around the allegation that he

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36. Exh. B.

37. See Exh. B.

was beaten by defendants. In determining whether defendants assaulted plaintiff, the court in part, as noted above, relies on the medical testimony; in part the court also relies on its evaluation of the credibility of individual witnesses. To that end, the court credits plaintiff's testimony that he was assaulted by Officers Brooks and Maldonado and a third unknown officer.[38] With respect to the events leading up to the time of the assault, there is little dispute. Plaintiff badgered defendant Maldonado to allow a fellow inmate attend that afternoon's movie.[39] Defendant Maldonado rejected these requests. He told plaintiff to lock-in, which he

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38. Tr. at 14.

39. Tr. at 9-10 and 427-29.

did.[40] Then defendant Maldonado wrote up a Notice of Report on plaintiff.[41]

At this point the two stories diverge. Plaintiff testified that he was "cracked out" of his cell and told that the sergeant wanted to see him.[42] Then it is plaintiff's testimony that Maldonado, Brooks and a third unknown officer assaulted him; they kicked, hit and punched him.[43] Plaintiff contends that he was hit between the eyes by a heavy object and fell unconscious.[44] However, this contention does not ring true. If plaintiff had received such a blow then Nurse Dupra

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40. Tr. at 10-11 and 428-29.

41. Exh. C-1.

42. Tr. at 12.

43. Tr. at 12-18.

44. Tr. at 16.

likely would have recorded in the medical record an injury to plaintiff's forehead. She did not.[45] Contrary to plaintiff's version, the court finds it much more likely that plaintiff suffered a hyperventilation "episode" during the attack and, as a result, fell unconscious.

The court credits plaintiff's testimony as to what occurred immediately after the assault. He testified that after becoming unconscious he awoke in his cell.[46] Upon waking, plaintiff testified, he got nervous for fear that his assailants would return and beat him some more.[47] He started to hyperventilate and fell

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45. Exh. 1-1.

46. Tr. at 16.

47. Tr. at 19.

unconscious.[48]

Defendants Maldonado and Brooks testified that they did not assault plaintiff.[49] The court does not credit that testimony. The court, as noted above, rejects the defense theory that plaintiff's injuries resulted from a seizure or "episode" in his cell. The court instead finds that on the afternoon of May 24, 1981 both defendants and a third unknown officer assaulted plaintiff and caused the injuries listed in the May 24, 1981 and May 26, 1981 entries on Exhibit 1-1.

While on the whole the court finds credible plaintiff's narration of both the events leading up to

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48. Tr. at 19.

49. Tr. at 426 and 432-33.

the assault and the details of the assault itself, the court does not find that the beating lasted 15 to 20 minutes as plaintiff testified.[50] The injuries are not consistent with a beating of that duration.[51] The court's finding that defendants assaulted plaintiff remains, nonetheless, unchanged. Even if plaintiff exaggerated the length of time of the assault, that does not mean he was not assaulted.

Circumstantial evidence supports the court's finding that the defendants did assault plaintiff on May 21, 1981. Defendant Maldonado conceded that he was a little upset with plain-

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50. Tr. at 18.

51. Tr. at 524 and 534 (Dr. Davis); Tr. at 305 (Dr. Ecker).

tiff.[52] Additionally, after the inmates on the movie list in Block H -- the block in which plaintiff was housed -- left for the movies, and as the inmates who were to go to the yard were leaving for the yard, defendants Maldonado and Brooks were to report to duty in the yard. Even though he testified that he went out into the yard that afternoon,[53] defendant Maldonado apparently did not show up for yard duty. His name does not appear on the yard station list kept by Sergeant LaVarnway on the afternoon of May 24, 1981.[54] In any event, if Maldonado did show up, he was most likely late. One explanation for defendant's absence or tardiness is that

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52. Tr. at 433 and 441.

53. See Tr. at 430.

54. Exh. F; see Tr. at 477.

he was kept late writing up a misbehavior report on plaintiff.[55] Another explanation, which the court finds plausible, is that defendant Maldonado did not show up or was delayed because he both wrote up the misbehavior report and assaulted plaintiff. Officer Brooks' name appears on the yard station list for that afternoon. He was posted as "extra."[56] Officer Brooks was "extra" because, as the yard sergeant testified, "[h]e must have been one of the last ones there."[57] Officer Brooks' late arrival for yard duty confirms that he had an opportunity to assault plaintiff.

The court's finding that

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55. Exh. C-3.

56. Exh. F; see Tr. at 476.

57. Tr. at 477.

defendants assaulted plaintiff is not undermined by the fact that the court does not credit the testimony of Max Vidal, an inmate who attempted to corroborate plaintiff's version of the facts. Vidal was not a credible witness. He proved evasive.[58] Furthermore, as defendants point out, Vidal's story rests on his having free reign of H Block. For instance, he testified that on May 24th at around the time plaintiff was assaulted, he traveled between several galleries on H Block.[59] While this is not impossible, it does not seem plausible because the general practice at Clinton was to keep the doors between the galleries locked

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58. See, e.g., Tr. at 176-77.

59. See, e.g., Tr. at 132-33, 150 and 157.

unless there was movement by the inmates on a large scale.[60]

Finally, the court adheres to its finding that defendants assaulted plaintiff despite conflicting testimony as to whether plaintiff told various prison personnel that he had been assaulted. Plaintiff testified that on May 24th he told two officers that he was assaulted. These were Sergeant Colon,[61] and Officer Rodriguez.[62] Plaintiff also testified that he told Nurse Dupra,[63] Dr. Sheridan, who was the prison doctor,[64] and Dr. Davis[65] that he was assaulted.

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60. Tr. at 410.
61. Tr. at 30.
62. Tr. at 27.
63. Tr. at 32.
64. Tr. at 41.
65. Tr. at 42.

Neither Officer Rodriguez nor Dr. Sheridan testified at trial. However, Sergeant Colon,[66] Nurse Dupra[67] and Dr. Davis[68] all took the stand and denied that plaintiff told them of the assault. In all probability, plaintiff did not tell these individuals that he had been assaulted. The motive for not telling these individuals is that he feared further retribution. Plaintiff testified that after the assault he was scared of the officers.[69] Consequently, he would be reticent to tell any prison personnel that he was attacked, because word might get back to the original assailants.

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66. Tr. at 383.
67. Tr. at 356.
68. Tr. at 518.
69. Tr. at 46; see Tr. at 19.

III. Liability.

The defendants concede in their pre-trial memorandum that "if plaintiff proves that either defendant hit, beat, kicked or punched plaintiff . . . it would constitute . . . 'unnecessary and wanton inflection [sic] of pain' and violate the Eighth Amendment." They cite for this proposition Whitley v. Albers, 475 U.S. 312, 320 (1986). See Unwin v. Campbell, 863 F.2d 124, 129 (1st Cir. 1989) ("the unjustified striking, beating, or infliction of bodily harm upon a prisoner gives rise to liability under 42 U.S.C. § 1983 on the part of one who, acting under color of state law, engages in such conduct without just cause") (quoting King v. Blankenship, 636 F.2d 70, 72 (4th Cir.

1980)); see also Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied sub nom., John v. Johnson, 414 U.S. 1933 (1973). Given the findings of fact in this case, the court concludes that defendants did violate plaintiff's eighth amendment rights and are liable for damages under 42 U.S.C. § 1983.

As noted much earlier, plaintiff, in addition to his claim under § 1983, also makes a claim under 42 U.S.C. § 1985. Section 1985 is captioned "Conspiracy to interfere with civil rights." In the case at bar, plaintiff cannot prevail under § 1985 because he presented the court with no evidence of a conspiracy. See Traggis v. St. Barbara's Greek Orthodox Church, 851 F.2d 584, 586-87 (2d Cir. 1988).

IV. Damages.

Plaintiff suffered the eight injuries previously listed in this opinion. He stayed in the prison hospital for two weeks after the assault. He complained of headaches and was treated with Tylenol and Vizine.[70] Despite the short duration of plaintiff's hospitalization and despite the unextraordinary nature of the care he received, plaintiff still complains of a lasting effect from the assault; namely he claims his vision is affected and he must wear glasses to correct it.[71] The court cannot accept plaintiff's contention of a lasting injury. By his own admission,

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70. Tr. at 43.

71. Tr. at 48.

plaintiff has worn glasses since 1969.[72] Furthermore, as defendants argue, there was no medical testimony establishing a causal connection between plaintiff wearing glasses and being beaten. Moreover, plaintiff's medical witness, Dr. Ecker, testified that the retinal hemorrhage had healed by the time he examined plaintiff on the first day of trial.[73] For the purpose of assessing damages, the court concludes that plaintiff suffered no permanent injuries.

"Physical injury as well as intangible injuries, such as pain and suffering, personal humiliation, mental distress, and embarrassment are compensable injuries under Section 1983."

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72. Tr. at 87.

73. Tr. at 314.

Freeman v. Franzen, 695 F.2d 485, 493 (7th Cir. 1982) (citations omitted), cert. denied, 463 U.S. 1214 (1982). In his complaint plaintiff seeks $100,000 in compensatory damages. The court awards plaintiff $12,300 dollars in compensation for his physical injuries and mental distress.

The issue of punitive damages is presently not before the court. During trial, the court bifurcated the consideration of punitive damages from the consideration of liability and compensatory damages.[74] At 10:30 a.m. on July 5, 1989 in the United States Courthouse in Auburn, New York this court will continue the trial as to the issue of punitive damages. The

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74. Tr. at 322.

parties are directed to file pre-trial submissions on this issue on or before June 14, 1989.

It is So Ordered.

Syracuse, New York.

Howard G. Munson
United States
District Judge

March 24, 1989

APPENDIX B

"Eng videotape" - lodged with Clerk

APPENDIX C

DEPOSITION EXHIBITS FROM
YOUNG V. NAPPER
No. 86-CV-453
(N.D.N.Y.)

In written material, words in **bold face** were printed on a form, words in ordinary type were typed onto a form, and words in *italics* were hand written. All relevant portions reproduced.

DEPOSITION EXHIBIT 3

Unusual Incident 2232, Use of Force 1271 - July 8, 1985 - Assault on Staff, Disruptive Behavior, Refusal to Follow Instructions - Inmate Cedric Young 79 A 836

CLINTON CORRECTIONAL FACILITY

USE OF FORCE-PHYSICAL EXAMINATION

INMATE'S NAME: *Young, Cedric*

DEPT. ID. NO.: *79 A 836*

EXAMINER'S NAME AND TITLE: *Philip T. Erickson, RN II*

TIME OF EXAMINATION: *9:00 AM*

DATE OF EXAMINATION: *7/8/85*

MEDICAL REPORT, DESCRIBE EXTENT OF INJURY AND TREATMEMT PROVIDED:

EXAMINED NUDE - ABRASION with CONTUSION ANTERIOR PORTION LT SHOULDER - Addendum 9:30 am Pt reexamined - superficial scratch + discolor on (R) upper arm (R) thigh (R) rib area and (R) chest.

RX: WOUND CLEANSED with H_2O
Addendum 9:30 Same Rx

Philip T. Erickson

DEPOSITION EXHIBIT 4

ACCIDENT REPORT

DATE OF ACCIDENT: *7/8/85*

PLACE: *YARD DOOR*

TIME: *approx. 8:45* **AM.**

INMATE'S FULL NAME: *YOUNG, CEDRIC*
NUMBER: *79 A 836*

EXTENT OF INJURY. DESCRIBE FULLY:

EXAMINED NUDE - ABRASION with CONTUSION ANTERIOR PORTION LT SHOULDER

Addendum 9:30 AM. Pt. reexamined - superficial scratch and discoloration on (R) upper arm, (R) thigh (R) rib area and (R) chest.

TREATMEMT EXTENDED. DESCRIBE FULLY:

WOUND CLEANSED with H_2O_2
Addendum 9:30 am, same Rx.

INMATE'S STATEMENT: *NO STATEMENT*

TIME INMATE ARRIVED AT HOSPITAL:
9:00 **AM.**

NAME OF PERSON FURNISHING TREATMENT:
Philip T. Erickson, RN

DEPOSITION EXHIBIT 31

STATE OF NEW YORK-DEPARTMENT OF CORRECTIONAL SERVICES

AMBULATORY HEALTH RECORD

INMATE NUMBER: *79 A 836*

INMATE NAME: *YOUNG, C.*

DATE: *07/08/85*

SUBJECTIVE: *USE OF FORCE*

OBJECTIVE: *ABRASION with CONTUSION ANTERIOR PORTION LT SHOULDER*

PLAN OR RX: *(1) ARMO (2) USE OF FORCE (3) WOUND CLEANSED with* H_2O_2

DATE: *07/08/85*

SUBJECTIVE: *Admission to Unit 14*

OBJECTIVE: *11:30 AM. Seen on admission to U.14. No new injuries noted from ARMO @8:45 AM.*

SIGNATURE: *C. Rock N*

DATE: 07/08/85

SUBJECTIVE: *Seen by C. Cobus RN MHSU while making PM rounds*

OBJECTIVE: *c/o multiple aches pains some trouble deep breathing sl dizzy*

PLAN OR RX: *TO SEE PA IN AM*

SIGNATURE: *R. Provence RN*

DATE: *07/09/85*

SUBJECTIVE: *c/o of mild Headaches, denies blurriness of vision or dizziness; denies breathing problems*

PLAN OR RX: *(1) will follow-up daily; (2) Sip & rinse mouthwash; (3) ASA 2 q 6 hrs prn*

DATE: *7/9/85*

SUBJECTIVE: *brought to IPC per ambulatory by order of watch commander*

OBJECTIVE: *c/o generalized aches & pains*

PLAN OR RX: *wants sleeping med. - told to see MHSU*

SIGNATURE: *R. Provence, RN*

DATE: *07/11/85*

SUBJECTIVE: *"involved in altercation"*

OBJECTIVE: *Generalized aches & pains.*

PLAN OR RX: *(1) Sip & Rinse mouthwash; (2) MLT 2 q 6 hrs prn*

DATE: *07/17/85*

SUBJECTIVE: *dry skin.*

PLAN OR RX: *(1) A & D ointment; (2) cepacol lozenges*

DATE: *07/18/85*

SUBJECTIVE: *Dry Skin; wants mouthwash*

PLAN OR RX: *(1) sip & rinse; (2) A & D ointment*

DEPOSITION EXHIBIT *70*

7/8/85, 3:20-11:20 cont.

3:50: Young, 79A 836 returned to cell. No incident.

3:55: Inmate Young, 79 A 836, examined by this writer - pt had numerous c/o - all reported to Med Staff Nurse, R. Provence

Pt. condition seems stable @ present - to be seen by P.A. in Morning

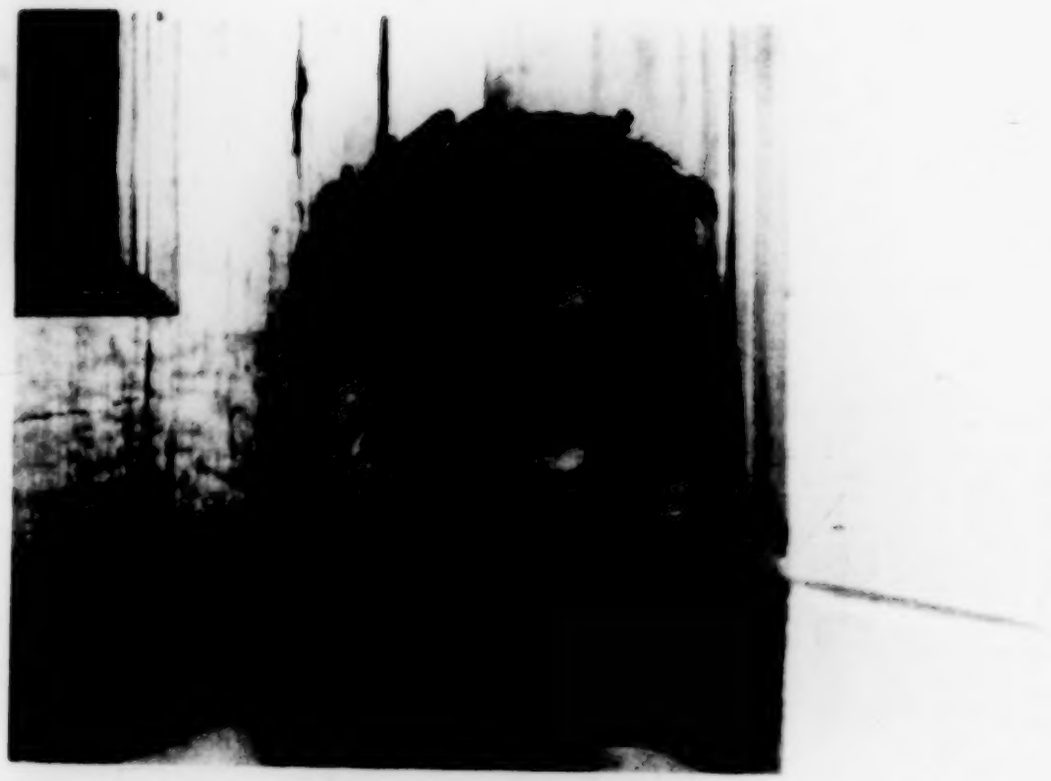
C. Cobus, RN

DEPOSITION EXHIBIT 87

Medical Log

3-11: 7-9-85

s/c 4:20 Young 79 A 836 U-14, Brought to IPC seen per request watch commander - "aching all over" Tylenol given



DEPOSITION EXHIBIT 85

DEPOSITION EXHIBIT 86

APPENDIX D

Correction Law, §137(5)

No inmate in the care or custody of the department shall be subjected to degrading treatment, and no officer or other employee of the department shall inflict any blows whatever upon any inmate, unless in self defense, or to suppress a revolt or insurrection. When any inmate, or group of inmates, shall offer violence to any person, or do or attempt to do any injury to property, or attempt to escape, or resist or disobey any lawful direction, the offi-

cers and employees shall use all suitable means to defend themselves, to maintain order, to enforce observation of discipline, to secure the persons of the offenders and to prevent any such attempt or escape.

The administrative policy is:

New York State Department of Correctional Services, Directive 4004, p. 1 (February 21, 1979).

The following rules will govern the use of physical force:

a. The greatest caution and conservative judgment shall be applied in determining whether physical force is necessary and the degree of such force.

b. When it is necessary to use

physical force, only such degree of force as is reasonably required shall be used.

c. Unless there is an immediate danger to safety, security or property, an employee will notify his supervisor who will notify the Superintendent, or person designated to act in the Superintendent's absence, of any situation where the use of physical force may become necessary and will not attempt to use physical force except in accordance with instructions received from the person designated by the Superintendent to take charge of the situation.

d. An employee will not lay hands on or strike an inmate unless the

employee reasonably believes that the physical force to be used is necessary for self-defense, to prevent injury to person or property, to enforce compliance with a lawful direction, to quell a disturbance, or to prevent an escape.

e. Other than a firearm, or chemical agents, an employee must use a weapon, for example a baton, issued by the Department only when and to the extent that the employee reasonably believes such use is necessary for self-defense, to prevent a serious assault, gross destruction of property, to quell a disturbance, or to prevent an escape. When it is necessary to use such a weapon, employee should take due care to

avoid, to the best of his ability the infliction of serious physical injury.